IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BRIGHT RESPONSE, LLC, Plaintiff,	§	
v.	§	Civil Action No. 2:07-cv-371-ce
GOOGLE, INC., et al., Defendants.	§	JURY TRIAL DEMANDED

BRIGHT RESPONSE, LLC'S MOTION IN LIMINE NUMBER 2
(TESTIMONY OF CHUCK WILLIAMS)

Plaintiff Bright Response, LLC files this pre-trial Motion in Limine pursuant to the Court's docket control order (D.I. 385), and before the commencement of the voir dire examination of the jury panel, concerning prior art references and arguments that Defendants may not rely on at trial for the reasons set forth below. Bright Response also files, concurrently with this Motion in Limine No. 2 additional motions in limine ("Plaintiff's Omnibus Motion") necessary for the Court's ruling to ensure no unfair prejudice impairs Bright Response's right to a fair trial.

I. ORDER REQUESTED AND SUMMARY OF ARGUMENT

Bright Response requests an order excluding Mr. Chuck Williams, a third-party witness, from testifying about a date on which the EZ Reader application was operational. Plaintiff noticed Mr. Williams's testimony based on late witness disclosures from Yahoo, and the deposition testimony establishes that his testimony on this point on timing is based only on an email. Under the Federal Rules of Evidence, Mr. Williams is not competent to testify on this issue based on an email that has never been identified or produced: he has no personal knowledge, his testimony lacks foundation, and the testimony is inadmissible hearsay.

II. BACKGROUND.

In June 2010, Defendant Yahoo disclosed for the first time as a witness in this case Mr. Chuck Williams. Wiley Decl. Ex. A. Mr. Williams was just recently deposed—on July 15, 2010. Wiley Decl. B.

Mr. Williams acknowledge this his knowledge about when the EZ Reader application—and when it was "deployed"—was from unspecified emails that he produced in advance of the deposition. Mr. Williams testified:

> Q. And do you have a recollection about when EZ Reader was deployed to act autonomously, excuse me, autonomously and interact with customers of Chase?
> **A. I have reason to believe it was near the end of March of 1996.**
> Q. And do you recall the basis for that, that recollection?
> **A. It was various emails that were sent to me by people on the project.**

Wiley Decl. Ex. B at 43 (emphasis (highlighting) added).

Mr. Williams confirmed again in the deposition that his knowledge came from these unspecified email communications:

> Q. Do you believe it was before March 29, 1996?
> **A. Possibly. My recollection is that it was going to go live on a weekend. So if you could tell me the day of the week that March 29, 1996 was, I could probably refresh my recollection.**
> 10:39-10:40 Page 47
> Q. I, I haven't looked it up to verify, but the, this Exhibit 1 appears to indicate that March 29, 1996 was a Friday.
> **A. So my understanding is it probably then went to production on March 30th, 1996.**
> Q. That's based on your recollection of a communication that it was going live around that time

frame?
A. Correct.

Wiley Decl. Ex. B at 46:20 – 47:9. (emphasis added).

As for Mr. Williams's related testimony regarding what was meant by the term "going live" for the EZ Reader application versus whether it was instead just in production or going into production (*e.g.*, *id.* at 53:16-54:9), Mr. Williams again confirmed that he was relegated to reviewing emails alone, despite not being entirely sure at all which emails even provided this information:

Q. Okay. Having just read that, I know we were discussing before about your, your recollection of EZ Reader, the EZ Reader application going live the weekend of either Saturday, March 30, or Sunday, March 31, and, if I recall, you expressed a recollection of having seen an email during this review you did in connection with this litigation of an email that indicated to you that it was about to go live imminently. Do you have an understanding whether this particular communication is the one that you saw?
MR. SMITH: Objection to form.
A. It, it is possible. It was a similar message. I don't know if it was this message or not.

See id. at 81-82 (emphasis added).

III. ARGUMENT

Mr. Williams's testimony concerning the EZ Reader application date of deployment and the unspecified emails on which he relies are inadmissible. Although Yahoo disclosed Mr. Williams late in the proceedings—in June 2010—close to the trial setting and requiring a deposition just two weeks out from trial,[1] three evidentiary hurdles preclude testimony from him

[1] *See E.E.O.C. v. Big Lots Stores, Inc.*, No. 9:08-CV-177, 2009 WL 3617603, at *2 (E.D. Tex. Sept. 29, 2009) (stating in context of whether trial should be delayed to allow deposition of

on this point. First, he is not a competent witness on this topic because he has no personal knowledge: "Federal Rule of Evidence 602 provides that a witness is not competent to testify to a matter about which he does not have personal knowledge." *Aurispa v. Texas Dep't of Commerce*, 68 F.3d 469 (5th Cir. 1995) (not designated for publication). *See* Fed. R. Evid. 602 ("a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *Washington v. Shop-Vac Corp*., 8 F.3d 296, 300 (5th Cir.1993) (holding that the district court did not abuse its discretion by excluding a witness's testimony regarding "what he would have done" in a particular situation because that opinion was speculative and not based on personal knowledge); *Hart v. O'Brien*, 127 F.3d 424, 438 (5th Cir. 1997) (declining to admit deposition testimony because witness not present at scene).

Second, but closely related to the lack of personal knowledge, Mr. Williams may not offer any testimony on the point of the EZ Reader's deployment and timing because the source for that knowledge is inadmissible hearsay. FED. R. EVID. 801, 802; *Aurispa*, 68 F.3d 469; *see also U.S. v. Quezada*, 754 F.2d 1190, 1196 (5th Cir. 1985) ("Of course, the hearsay rule and the personal knowledge requirement are cut at least in part from the same cloth, as the Advisory Committee Notes to Rule 602 acknowledge…").

Third, there is no proper foundation for the emails that would render them admissible. *See Sowders v. TIC United Corp*., 2007 WL 3171797, at *2 (W.D. Tex. 2007) ("Because

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witness: "However, a party's right to present evidence is not unlimited, and does not trump all other considerations. Courts may bar testimony by a fact witness who was not timely disclosed. Fed.R.Civ.P. 37(c)(1). … Ltd., 993 F.2d 1201, 1207 (5th Cir.1993) (an expert may testify to the basis for his or her opinion, but cannot testify as to otherwise inadmissible evidence). Courts are to administer the Federal Rules of Civil Procedure so as to allow a fair opportunity to present evidence that promotes justice, while at the same time providing for a "speedy and inexpensive determination" of every case. Fed.R.Civ.P. 1.").

Plaintiff did not lay a proper foundation for admission of the statements of John Moore, it was not error to exclude them."); *id*. at n.6 (citing *Litton Systems, Inc. v. AT & T*., 700 F.2d 785, 816-817 (2nd Cir.1983) (AT & T made no attempt at trial to lay the necessary foundation for the admission of notes under 801(d)(2)(D)"); *United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) (noting that is evidence not authenticated there is no "laying of proper foundation").

IV. CONCLUSION

Bright Response therefore requests the Court to enter the attached order, precluding any testimony from Mr. Williams as to the date of the EZ Reader application's operation, production, or deployment on or around any particular date. The Court's exclusion of that testimony, as the Federal Rules of Evidence require, also means that the Court's order should also preclude and prohibit Defendants and their counsel from referring to, mentioning, arguing, or relying on for any arguments at trial, within hearing of the jury, the excluded testimony from Mr. Williams.

Dated: July 22, 2010

Respectfully submitted,

By: /s/ Elizabeth A. Wiley
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this motion has been served on all opposing counsel of record on this 22nd day of July 2010.

\s\ Elizabeth A. Wiley
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